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# Benjamin D. Ritholz et al v. City of Salt Lake et al : Brief of Respondents

Utah Supreme Court

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# In the
# Supreme Court of the State of Utah

BENJAMIN D. RITHOLZ, SAMUEL J. RITHOLZ, FANNIE RITHOLZ, MORRIS I. RITHOLZ, SOPHIE RITHOLZ, SYLVIA RITHOLZ, J. BEDNO and ANN BEDNO, d/b/a KING OPTICAL COMPANY,
*Plaintiffs and Respondents,*

vs.

THE CITY OF SALT LAKE, a municipal corporation, and EARL J. GLADE, LORENZO C. ROMNEY, GRANT M. BURBIDGE, JOE L. CHRISTENSON, and LYLE B. NICHOLES, its Board of Commissioners,
*Defendants and Appellants.*

Case No. 8296

## BRIEF OF RESPONDENTS

VAN COTT, BAGLEY,
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CLIFFORD L. ASHTON,
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ARROW PRESS, SALT LAKE

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Case No. 8296

## BRIEF OF RESPONDENTS

### STATEMENT OF FACTS

In September of 1954 the Salt Lake City Commission passed an ordinance known as Section 4865 entitled "Ad-

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vertising Prices of Prescription Eyeglasses, Lenses, or Frames and Prescription Lenses." This ordinance among other things prohibited individuals, firms, corporations or associations from advertising the price of eyeglasses, lenses or frames at a definite or fixed price. The ordinance is set out verbatim in the brief of appellants at Page 2 and 3, and is set out at Page 5 and 6 of the Record.

On the 21st day of September 1954, the Respondents filed a complaint in the District Court of Salt Lake County seeking injunction restraining the City and its officers and agents from enforcing or undertaking any activities in connection with the enforcement of the aforesaid ordinance on the grounds that the ordinance was invalid and unconstitutional.

In conjunction with the filing of the complaint Respondents obtained an Order from Judge Ellett requiring the Appellants to show cause on the 23rd day of September, 1954, why they should not be restrained from enforcing the ordinance during the pendency of the action. Prior to the hearing plaintiff amended its complaint to bring the complaint within the provisions of the Declaratory Judgment Statute (R. 11). The City filed Motion to Dismiss raising the question of the sufficiency of the amended complaint.

On the 23rd day of September the Order to Show Cause was heard before Judge Ellett. At the conclusion of arguments by counsel the Court indicated *pro forma* that He believed the ordinance to be both invalid and unconstitutional. Prior to formal ruling both parties filed a Stipulation and a Consent so that the case could be submitted for

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final judgment. In the Stipulation it was agreed that the Respondent owned under a proper registration a business known as King Optical Company, which Company manufactures, processes and dispenses optical goods in the State of Illinois. It was also agreed that Respondents operate in Salt Lake City an optical store in which they sell optical goods consisting of lenses, frames and eyeglasses to customers on prescription from licensed doctors and optometrists. It was further agreed that Respondents incident to the operation of their business, use various methods of advertising, including price advertising in local newspapers and that this type advertising is in violation of the ordinance. A copy of the type advertising conducted by the Respondents is attached to the Stipulation and is shown at Page 16 of the Record.

As a necessary preliminary to a final judgment the City Attorney and George E. Bridwell, acting as one of the attorneys for the City, signed a consent in which they agreed that the District Court could determine the legal point raised by plaintiffs' amended complaint, and expressly waived the right to introduce any evidence. It was expressly provided that this waiver was for the purpose of enabling the trial court to decide the issues of constitutionality and validity. All material conflicts raised by the complaint were deemed denied and controverted except as stipulated (R. 17).

On the 10th day of November, 1954, Findings of Fact, Conclusions of Law and Judgment and Order were filed. In the Judgment the Court held that the ordinance was unconstitutional and invalid. In fairness to the Court it

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must be stated that the only matter argued and the only matter considered by the Court was the provision of the ordinance relating to price advertising. It has not been contended by either Appellants or Respondents and certainly was not intended by the Court, that those provisions of the ordinance dealing with other matters were in any way involved in this decision.

The foregoing represents a complete reference to the facts which were before the Court in this case. The statement of counsel to the effect that "The spokesmen for the Utah Medical Society, the Optometric Association, and the Society for the Blind will tell you that price advertising . . . will result in deceptive and inferior merchandise . . ." is purely gratuitous and outside the record (P. 6 Appellant's Brief).

## STATEMENT OF POINTS RELIED UPON

### POINT I.

### THE PROVISION OF THE ORDINANCE DEALING WITH PRICE ADVERTISING IS INVALID.

(a) Municipal Ordinances in cities operating under delegated powers are strictly construed.

(b) Authority to limit price advertising of glasses and lenses is not expressly granted to the City of Salt Lake.

(c) Power to control price advertising of glasses cannot be necessarily or fairly implied as an incident to the powers expressly granted.

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## POINT II.

## THE ORDINANCE IS UNCONSTITUTIONAL.

(a) Introductory.

(b) The ordinance violates the Utah State Constitutional Right of freedom of speech, including the right to communicate freely thoughts and opinions.

(c) The ordinance violates the Utah State Constitutional provisions prohibiting the enactment of special laws.

(d) The ordinance violates the Utah State Constitutional provision prohibiting combinations controlling price of products.

## ARGUMENT

### POINT I.

### THE PROVISION OF THE ORDINANCE DEALING WITH PRICE ADVERTISING IS INVALID.

(a) Municipal Ordinances in cities operating under delegated powers are strictly construed.

Appellants in their brief under Point 3 argue that "The courts are bound by a strong presumption of validity of a municipal ordinance." We know of no such rule except where the ordinance in question is enacted by a city operating under a Home Rule Charter. In cities operating under authority delegated by the legislature the rule is exactly

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the reverse of appellants' contention. In *Salt Lake City* v. *Revene*, 101 Utah 504, 124 P. 2d 537 (1942) the Supreme Court cited with approval the general rule set out at Page 448 *I Dillon Municipal Corporations, 5th Ed.:*

> ". . . that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable."

The Court further referred with approval to *Dillon Municipal Corporations*, supra, at page 449 where the following appears:

> ". . . any fair, reasonable, substantial doubt concerning the existence of the power is resolved by the courts *against* the corporation [city], and the power denied." (Italics ours.)

It is thus clear that in this state the rule of construction *is strict, and not liberal,* as contended by Appellants.

(b) Authority to limit price advertising of glasses and lenses is not expressly granted to the City of Salt Lake.

Title 10, Chap. 8, Sec. 39, U. C. A. 1953, provides that cities may

> ". . . license, tax and regulate the business conducted by merchants, wholesalers and retailers, shopkeepers and storekeepers . . ."

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Sec. 61 provides that they may:

> ". . . make regulations to secure the general health of the city, prevent the introduction of contagious, infectious or malignant diseases into the city, and make quarantine laws and enforce the same within the corporate limits and within twelve miles thereof."

Sec. 84 provides:

> "They may pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by this chapter, and such as are necessary and proper to provide for the safety and preserve the health and promote the prosperity, improve the morals, peace and good order, comfort and convenience of the city and the inhabitants thereof, and for the protection of property therein; . . ."

The foregoing constitute the only express delegation of authority to the city which in any conceivable way could relate to the ordinance in question. Clearly, these provisions do not *expressly* grant to the City power to prohibit price advertising of glasses. If such a power exists it must be "necessarily or fairly implied in or incident to the powers expressly granted."

(c) Power to control price advertising of glasses cannot be necessarily or fairly implied as an incident to the powers expressly granted.

Even a liberal construction of the foregoing legislation would not justify an inference that the express words em-

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power the City of Salt Lake to enact an ordinance prohibiting price advertising of eyeglasses. Particularly is this so in view of the serious questions concerning the constitutionality of such a provision. (See infra.)

In *Ritholz et al.* v. *City of Detroit,* 308 Mich. 258, 13 N. W. 2d 283, the Supreme Court of that State had before it a municipal ordinance of the City of Detroit similar to the one before this Court. The Court in rendering its decision went beyond the *ultra vires* question and held that the ordinance was unconstitutional. The Court said:

> "In my opinion the evil sought to be corrected by the ordinance is a business evil. The ordinance has no relation to public health and is an unlawful interference with private business. It is void as being in violation of the fourteenth amendment of the United States Constitution."

The only state which has *sustained validity of such an ordinance is Ohio.* That case was *Springfield* v. *Hurst,* 56 N. E. 2d 185, 144 Ohio St. 49. That Court in a divided opinion held that an ordinance similar to the one in question was constitutional. It did not determine the question raised under this point, to-wit: the question of the power of a municipality to enact such an ordinance. The reason the *ultra vires* question was not raised in the Ohio case is clear. Ohio cities operate under Home Rule Charters and therefore are not limited by the strict rule applicable to cities which have only those powers which have been expressly designated by the legislature and those which are necessarily implied by reason of the express delegation. The Utah

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Supreme Court in the *Revene* case, supra, recognized this distinction and stated:

> "The Ohio cases cited by plaintiff . . . arise under the plenary powers of Home Rule Cities and are not authority for the case at bar. They are authority only on the question of constitutionality."

Further reasons for doubting that the legislature delegated to Salt Lake City implied authority to control price advertising are the following *Constitutional Provisions of the State of Utah.*

Art. I, Sec. 24:

> "All laws of a general nature shall have uniform operation."

Art. VI, Sec. 26:

> "In all cases where a general law can be applicable, no special law shall be enacted."

We must assume that the legislature which delegated authority to Salt Lake City to "license, tax, and regulate the business conducted by merchants, wholesalers and retailers, shopkeepers and storekeepers" and "make regulations to secure the general health of the city . . ." contemplated that the city would enact only those laws customarily or ordinarily controlled by cities and which are not general in nature.

Certainly any law controlling price advertising of any commodity, including eyeglasses, is of such uniform applicability, that it is difficult to assume that the legislature

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ever intended such law be enacted by City ordinance. When, and if, such law is enacted, it should be first considered by the policy-making bodies, to-wit, the legislative and executive branches of the State Government.

We have made diligent search and have failed to find an ordinance dealing with the control of price advertising of optical goods which has been held valid in any state except the Home Rule State of Ohio. Considering the serious constitutional questions which attach to legislation of this kind it seems inconceivable under the strict rule of construction approved by the Supreme Court of the State of Utah that the power of a city to enact an ordinance in such a questionable field could be necessarily or reasonably implied from the express powers given especially under a rule of construction which states that "any fair, reasonable, substantial doubt concerning the existence of the power is resolved by the courts against the corporation."

After Judge Ellett had made his ruling in the instant case, the problem was presented to the last session of the Legislature in the form of Senate Bill 17, which was introduced in the House as House Bill No. 68. This Bill, among other things, prohibited price advertising by opticians. In effect it was designed to accomplish the same purpose for which the questioned ordinance was designed. Both the Senate and the House passed this proposed legislation. Thereafter it was vetoed by the Governor who wrote the following veto message:

> "In accordance with Article VII, Section 8, Constitution of Utah (relating to the governor's veto power), I am returning herewith S. B. 17, entitled

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Dispensing Opticians' Code, which I do not approve and am hereby vetoing. My reasons for doing this were formulated only after hearing both proponents and opponents of this bill over the past several days.

"I am advised by the Attorney General's office that the part of the act prohibiting price advertising of glasses is of questionable constitutionality. I am also advised that a District Court Judge of the Third Judicial District has ruled that a Salt Lake City ordinance designed to accomplish the same purpose was unconstitutional, and that this case is now being appealed to the Utah Supreme Court.

"My objection, however, goes beyond the possible question of constitutionality. I am in sympathy with optometrists who desire to improve the standards of optometry and the quality of glasses sold to the public. Insofar as this bill tends to accomplish these purposes it has my full approval. I am, however, strongly opposed to any legislation promoted by one class or group which in any way deprives others of fundamental rights unless there is some clear showing that the public interest will be served.

"In an effort to determine for my own satisfaction this fact, I have given supporters of the bill at least two opportunities to show me wherein prohibiting an optician from advising a customer beforehand of the price of glasses in any way protected the public.

"I have not yet heard any argument which convinces me that this would be the fact.

"Existing state statutes now prohibit false, misleading and fraudulent advertising. Those provisions of the proposed legislation which support this general purpose are certainly not objectionable. Whoever inserted the provision prohibiting price advertising apparently presupposed that any opti-

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cian who advertises price is dishonest and guilty of baiting the public.

"But what of the honest optician who desires to advise the public beforehand of the price of a pair of glasses? Must this fundamental right be taken away from him? I see no reason for prohibiting honest price advertising.

"Finally I am not unmindful of the fact that price advertising, so long as it is truthful, may have a very wholesome effect on the price of glasses paid by the public in general. I will not be a party to any law which would in any way prevent the public from being fully informed of these facts.

"For these reasons and because of my duty as governor to the people of this state, I feel it is my duty to enter this veto."

From the foregoing, of which this court can take judicial knowledge, it is apparent that at least the Executive Department of the state government and many of the legislators were opposed to a state statute prohibiting price advertising. In view of this fact it would be strange indeed to imply from the express powers given to municipalities, an implied power to enact into law that which the highest policy-making branches of the government have determined should not become law.

Title 58, Chap. 16, provides statutory regulations for the control of optometrists. In Section 13, sub-section (3) it is provided that:

"The following persons are exempt from the operation of this chapter: . . .

"(3) *Persons who sell eyeglasses or spectacles as articles of merchandise;* provided, (a) they do so

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> in the ordinary course of trade from permanently located and established places of business; (b) they do not traffic or attempt to traffic upon assumed skill in testing the eye and adapting lenses thereto; (c) they do not duplicate or replace or accept for duplication or replacement any lens or lenses unless they are exclusive wholesale optical establishments; (d) they do not use in the testing of the eye lenses other than the lenses actually sold; (e) they do not give or offer eyeglasses or spectacles as premiums." (Italics ours.)

This provision of the statute on a *legislative* level clearly excepts opticians from the operation of the act. In *Golding* v. *Schubach Optical Co.*, 93 Utah 32, 70 P. 2d 871, the Supreme Court of Utah held that the Court could not extend statutes regulating the practice of optometry to bar department store and optical company operating concessions from employing licensed optometrists to examine and prescribe for patients *or from advertising service* of such optometrists, as statutes did not make such practice illegal, and the Court could not concern itself with what legislature should have done, but only with statutes as they were enacted. In this same case the Court held that employment of a licensed optometrist by the Schubach Optical Company for the purpose of examining patients' eyes and prescribing lenses and the advertising of such services, was not against public policy or legislative enactment and therefore could not be enjoined.

Inasmuch as the legislature has clearly exempted opticians from the operation of the Optometry Act, which attempts to regulate but not prohibit price advertising, it would seem clear that the legislature did not intend that

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municipalities be empowered to do that which it itself had chosen not to do.

It is clear from the general statutes of the State of Utah that false, fraudulent and misleading advertising of all types is prohibited. If the Legislature had intended to take a step as broad as that prohibiting price advertising it certainly could have done so. It is true that the professions regulate the conduct of their members and that lawyers, doctors and dentists, on a professional basis, prohibit advertising. We, however, have been unable to find anywhere in the Utah statutes, even in those statutes dealing with the regulation and control of professions, any statutory prohibitions or regulations controlling the advertising of prices. Until the Legislature has so spoken it seems unreasonable to assume that the power to enact such questionable law can be implied from the express delegation of power to regulate granted to municipalities.

## POINT II.

## THE ORDINANCE IS UNCONSTITUTIONAL.

### (a) Introductory.

We believe, as contended under Point I herein, that the ordinance in question is invalid because it is *ultra vires*, therefore we do not believe that the constitutional question should concern this court. However, should this Honorable Court disagree with our contention and hold that the power to pass such an ordinance has been delegated to the City the question of constitutionality could become a real issue.

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The question of the constitutionality of statutes regulating price advertising has been considered in several jurisdictions. (See *Commonwealth* v. *Ferris*, (1940) 305 Mass. 233, 25 N. E. 2d 378; *State ex rel. Booth et al.* v. *Beck Jewelry Enterprises, Inc. et al.* (1942) 220 Ind. 276, 41 N. E. 2d 622; *Ritholz* v. *City of Detroit* (1944) 308 Mich. 258, 13 N. W. 2d 283; *City of Springfield* v. *Hurst*, (1944) 144 Ohio St. 49, 56 N. E. 2d 185; *Ritholz* v. *Johnson* (1945) 246 Wis. 442, 17 N. W. 2d 590; *Ritholz* v. *Commonwealth* (1945) 184 Va. 339, 35 S. E. 2d 210; *State* v. *Rones*, 223 La. 839, 67 So. 2d 99).

The foregoing cases all dealt with state statutes, with the exception of the *City of Springfield* case, which dealt with a municipal ordinance. As herein pointed out the *Springfield* case involved an ordinance enacted by a Home Rule City and therefore the question of *ultra vires* was not discussed.

From the foregoing cases it appears that there is a split of authority as to whether or not such statutes are constitutional. In most all of the cases deciding this question one or more of the judges dissented.

In the *Detroit* case and in the *Beck Jewelry* case, supra, the courts squarely held that statutes attempting to prohibit price advertising are unconstitutional. In the *Johnson* case supra, the court in reality did not decide the question of constitutionality, but determined the case on a procedural ground, holding that an action in equity to enjoin enforcement of an entire ordinance would not justify the relief prayed for because some of the ordinance was un-

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doubtedly valid. (The *Johnson* case was not brought under a Declaratory Judgment Act.) The court did however indicate by *dicta* a position favorable to the proposition that such legislation is constitutional. The *Virginia* case is of doubtful value on the question of constitutionality because the act construed was an Optometry Act and not primarily an act to regulate the merchandising of eyeglasses by opticians. In the *Virginia* case the court acknowledged that some jurisdictions were contrary to the position taken by the *Virginia* case. The court said:

> "Respondents further contend that a statute prohibiting a party who is expressly authorized to sell spectacles and eyeglasses from advertising the prices is invalid because it violates the Bill of Rights, sec. 1, and the due process clause, sec. 11, of the Constitution of Virginia. In other words, the contention is that this specific regulation as to quoting prices is so arbitrary and unreasonable that it unduly interferes with respondents' right to conduct a business expressly authorized by statute.
>
> "On this question the courts are divided. Some hold that provisions prohibiting such advertisements quoting prices are arbitrary and an unreasonable restraint of a lawful business. See *Regal Oil Co.* v. *State,* 123 N. J. L. 456, 10 A. 2d 495; *Golding* v. *Schubach Optical Co.,* . . . Utah . . ., 70 P. 2d 871; *State ex rel. Booth* v. *Beck Jewelry Enterprises, Inc.,* 41 N. E. 2d 622, 141 A. L. R. 876; and see discussions in *Sage-Allen Co.* v. *Wheeler,* Conn., 179 A. 195, 98 A. L. R. 897 (reversed for the taking of additional evidence); and *State, by Ervin* v. *Goodman,* Minn., 288 N. W. 157." (Italics ours.)

We would like to believe that the quotation from the *Virginia* case correctly states the position taken by the

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Supreme Court of the State of Utah. We think, however, that the *Schubach* case referred does not hold that price advertising is unconstitutional. It does hold, contrary to decision in the *Virginia* case, that optometry is *not* a profession.

We believe that the question of Constitutionality in the instant case rests on the Constitutional provisions set out in the *Utah State Constitution. We do not claim that the ordinance violates the Federal Constitutional provisions.*

(b) The ordinance violates the Utah State Constitional Right of freedom of speech, including the right to communicate freely thoughts and opinions.

Art. 1, Sec. 1, provides as follows:

> "All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; *to communicate freely their thoughts and opinions, being responsible for the abuse of that right.*" (Italics ours.)

Art. I, Sec. 1, supra, goes further than any provision in the Federal Constitution. It not only guarantees the right of freedom of speech, but affirmatively guarantees the right *"to communicate freely their thoughts and opinions, being responsible for the abuse of that right."*

Legislation prohibiting truthful price advertising would be nothing more than legislation prohibiting citizens

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from "*communicating freely their thoughts and opinions.*" Consistent with this guarantee is the provision providing responsibility for the free communication of thoughts and opinions. State statutes so provide in that they generally prohibit false, fraudulent and misleading advertising. We submit that a prohibition eliminating truthful advertising by a merchant of any product which can be legally sold violates the foregoing provision.

Art. 1, Sec. 15, provides:

> "No law shall be passed to abridge or restrain the freedom of speech or of the press."

The foregoing provision is similar to the provision contained in the First Amendment of the Federal Constitution. It, of course, is not as specific as the provisions contained in Art. I, Sec. 1 of the Utah State Constitution.

In *Saville* v. *Corless,* 46 Utah 495, 151 Pac. 51, the Supreme Court of Utah held that a statute regulating the working hours of all employees of mercantile establishments and requiring such establishments, including mens' furnishing stores and jewelry businesses, to close at 6:00 o'clock was unconstitutional. During the course of its opinions the Court said:

> "We think it also offends against constitutional rights to enjoy, acquire and possess property, *the most valuable of which is that of alienation, the right to vend and sell.*" (Italics ours.)

(c) The ordinance violates the Utah State Constitutional provisions prohibiting the enactment of special laws.

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Art. I, Sec. 24 provides:

> "All laws of a general nature shall have uniform operation."

Art. VI, Sec. 26, among other things, provides:

> "In all cases where a general law can be applicable, no special law shall be enacted."

The ordinance in question specially selects one type of merchandise which can be legally sold and prohibits price advertising of the same. What is there about eyeglasses and frames which entitle them to this special consideration? If price advertising is to be prohibited why should such prohibition apply only to glasses? Why not hearing aids, aspirin, prosthesis of all kinds, and for that matter food and medicines. To select only glasses gives away the whole plot. It reveals such legislation in its true light. It is designed to appease only a special group, to-wit, the optometrists and opticians competing with Respondents. If the public welfare is at stake all merchandise of a class should be considered in one statute or ordinance prohibiting price advertising generally.

The foregoing Utah State Constitutional Provisions, prohibiting special law, are not contained in the Federal Constitution.

(d) The ordinance violates the Utah State Constitutional provision prohibiting combinations controlling price of products.

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Art. XII, Sec. 20 provides, among other things, the following:

> "Any combination by individuals, corporations, or associations, having for its object or effect the controlling of the price of any products of the soil, or of any article of manufacture or commerce . . . is . . . hereby declared unlawful and against public policy."

We submit that this constitutional provision clearly indicates that any legislation or municipal ordinance which would tend to accomplish price control would be unconstitutional. Certainly a prohibition of honest price advertising would tend to have such an effect.

In the second *Revne* case, *Revne* v. *Trade Commission*, 113 Utah 155, 192 P. 2d 563, the Supreme Court of this State cited with approval the lower court's finding that the foregoing Constitutional Provision prohibited the Trade Commission from fixing prices of haircuts. The Court finally held that a legislative act delegating the power to fix such prices was an unconstitutional delegation of authority.

## CONCLUSION

From the foregoing we submit that the municipal ordinance in question is invalid and unconstitutional.

Respectfully submitted,

VAN COTT, BAGLEY,
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*Attorneys for Respondents.*

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